BEFORE THE DOCKET FILE COPY ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	))	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)))	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

SURREPLY OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby respectfully submits this Surreply in response to comments and reply comments filed pursuant to the above captioned Second Further Notice of Proposed Rulemaking, released by the Federal Communications Commission ("Commission" or "FCC") on October 17, 1997.[1] Time Warner, through various subsidiaries and affiliates, operates cable television systems across the nation. This Surreply is submitted primarily in response to the study by Prof. Michael D. Whinston (hereinafter the "Whinston Study") which

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[1]Telecommunications Service Inside Wiring, Customer Premises Equipment, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 94-184, FCC 97-376 (rel. October 17, 1997) ("Second Further Notice").

was commissioned and submitted by the Independent Cable and Telecommunications Association ("ICTA") as part of is Reply Comments to provide an evaluation of the desirability of exclusive contracts to provide multichannel video programming service to multiple dwelling unit ("MDU") buildings.

Time Warner is compelled to express its deep concerns about the objective nature of the Whinston Study, and believes it offers little insight into resolving the issues put forth in this proceeding. Prof. Whinston makes numerous assertions that are unrealistic and constructs hypotheticals using gerrymandered numbers to deduce conclusions that prove his study to be nothing more than a self-serving extension of ICTA's positions coined in the language of an economist. In the end, the Whinston Study simply provides no compelling rationale why non-cable MVPD exclusive contracts should be afforded special protection if franchised cable operator exclusive contracts are to be prohibited or restricted. In light of the high degree of competition for providing MDU video services, and in light of the new inside wiring rules,[2] there is simply no justifiable reason why the Commission should adopt any regulation that has the effect of interfering with cable operators' ability to enter into and enforce MDU exclusive contracts, while conversely blessing or protecting non-cable MVPDs' exclusive contracts.

With regard to existing cable operator exclusive contracts, absent an explicit act of Congress, the Commission simply does not have the authority to destroy the valid legal rights of parties which have entered into exclusive MDU service contracts. Regardless of whether any such restrictions would invalidate exclusive contracts altogether or simply apply the "fresh

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[2] See id.

look" approach to so-called "perpetual" exclusive contracts,[3] such action would constitute an impermissible retroactive abrogation of privately negotiated, enforceable contractual rights.[4] Without an explicit directive from Congress allowing it to unilaterally modify such rights, such action would fall entirely outside of the Commission's jurisdiction, and would constitute an illegal and unconstitutional taking of private property without due process.[5]

As to both existing and future exclusive contracts, the Whinston Study provides no compelling reason why the Commission should discriminate between cable operators and non-cable MVPDs in restricting their ability to enter into and enforce exclusive contracts. On its face, such discrimination would be misdirected if the goal of this proceeding is truly to foster open MDU video service competition for the ultimate benefit of consumers. The Commission's goal should instead be parity among all MVPDs seeking to serve MDUs, and if public

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[3]Contracts which run for the term of a franchise and any renewals thereof are not perpetual. A life-of-the-franchise-contract has a defined end; it ends when the franchise expires. Any renewals of the franchise, and corresponding renewals of the exclusive service contract, are not guaranteed. Rather, they are subject to renegotiation by either party at the end of the franchise term. Therefore, as a matter of law, life-of-the-franchise contracts are not "perpetual." See Time Warner Comments at 5; Time Warner Reply Comments at 8.

[4]See Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907); Bell Tel. Co. of Pa. v. FCC, 503 F.2d 1250, 1280 (3d. Cir. 1974).

[5]See, e.g., Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994) (FCC must have express statutory authority to effect a taking of private property). Time Warner disputes the ability of the FCC to apply a "fresh look" approach to exclusive contracts since Congress has not granted the Commission such authority. To the extent the Commission attempts to restrict the term of exclusivity bargained for between the MDU owner and the MVPD, either through a "fresh look" concept or otherwise, the Commission must make clear that this does not affect any other term of the contract. For example, the MVPD would continue to have the bargained-for right to offer service within the MDU, albeit on a non-exclusive basis.

policywarrants any restrictions whatsoever on exclusive contracts, they should apply equally to all MVPDs.

Prof. Whinston's argument that Commission discrimination is required due to the unique nature of cable and non-cable MVPDs is incorrect given the current state of competition and Commission regulation.[6] There is no evidence that an MDU owner entering into a service contract with a cable operator is or has been unfairly influenced by the cable operator's alleged "market power" position. Given that MDU owners have for a long time faced no shortage of bidders to offer MVPD service to their residents, and MDU owners readily admit that the ability of all MVPDs to offer exclusive contracts has helped foster this highly competitive environment, there is no reason why the Commission must now interfere with the free hand of the marketplace.[7] Furthermore, assuming ICTA's assertion that MDU owners always act in the best interests of their residents in making video service decisions, there should be no reason why MDU residents should not be allowed to enjoy the benefits of any exclusive contract negotiated by an MDU owner with a cable operator (as opposed to another type of MVPD). The Commission should rely on competition rather than attempt to regulate agreements between private parties, or choose which MVPDs to favor over others.

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[6]Whinston Study at 5-10.

[7]"Another notable feature of the current contracting environment for contracts with MDUs is its highly competitive nature." ICTA Reply Comments at 8. The increasingly competitive nature of a vast array of MVPD technologies seeking to provide service to MDU subscribers was also recognized by the Commission in its recent Fourth Annual Report on the Status of Competition in Markets for the Delivery of Video Programming, CS Docket 97-141, FCC 97-423 (rel. Jan. 13, 1998) ("Fourth Annual Competition Report") at ¶¶ 129-139.

Prof. Whinston's conclusion that non-cable MVPDs' unique cost structure demands that they alone reap the benefits of exclusive contracts also falls under its own weight.[8] Prof. Whinston does not provide any real world evidence that non-cable MVPDs incur significantly higher capital costs in order to provide service to an MDU; he simply makes this unfounded assumption, assigning huge differences in costs to cable and non-cable MVPDs. Indeed, his use of grossly skewed values in this regard exposes his study and its use of hypotheticals as nothing more that a results-oriented advocacy paper.

There is just no evidence that it is typical for there to be anywhere near a four to one disparity in the cost incurred by a non-cable MVPD as compared to a cable operator in order to provide service to any MDU.[9] This is especially true given the fact that an MVPD taking advantage of the new inside wiring rules will not have to install home run wiring. According to ICTA itself, new MVPDs would always opt to use the new inside wiring rules and would never install new wiring within a building when it was previously wired by a former service provider. It is hard to understand then ICTA's claim to a unique need for an exclusive contract to recoup its members' investment. Therefore, considering the adoption of the new inside wiring rules, allowing only non-cable MVPDs to enter into exclusive MDU contracts cannot possibly be justified.

Prof. Whinston's further argument that non-cable MVPDs must alone be allowed to enjoy the benefits of exclusive contracts in order to protect against "socially inefficient"

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[8]Whinston Study at 13-14.

[9]Id.

overbuilds by cable operators is equally flawed.[10] This conclusion is only valid if one accepts Prof. Whinston's unsupported assertion that it is only possible for a single MVPD to economically provide service within a given building.[11] But the facts are otherwise.[12] RCN acknowledges that it is not necessary to obtain an exclusive contract for competing MVPDs to be willing to serve MDU customers.[13] Moreover, as noted by Ameritech, there are tremendous consumer benefits associated with multiple MVPDs simultaneously offering service in MDUs.[14]

To the extent ICTA and OpTel claim that the Whinston study demonstrates that absent exclusive access, non-cable MVPDs are unwilling or unable to provide service to MDUs, such claims run contrary to recent acquisitions by some of their largest members, including OpTel's recent purchase of MDU systems accessing over 500,000 MDU units in jurisdictions such as Florida, Illinois and the District of Columbia, which are states with statutory mandatory access rights.[15] In addition, Bell Atlantic's recent cross-marketing agreement with DirecTV

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[10]Id. at 14.

[11]Id. at 14-15.

[12]The Commission has previously noted the rapidly increasing number of MDUs in New York City which allow two-wire competition. Second Further Notice at ¶ 37. The record simply does not support a conclusion that two-wire competition in MDUs is economically impossible.

[13]RCN Reply Comments at 2.

[14]See Ameritech Reply Comments at 5-6.

[15]See Communications Daily (March 9, 1998) at 11. Another example is RCN's connection of 310 buildings in New York City and 52 buildings in Boston pursuant to access agreements that generally contain no exclusivity provision. See Fourth Annual Competition Report at ¶¶ 131-132. Again, both New York and Massachusetts are mandatory access states.

targeting MDUs within Bell Atlantic local telephone service area, provides further evidence that alternative MVPDs are anxious to offer services to MDUs even without exclusivity, given that almost every metropolitan area encompassed by this agreement is located in a state where exclusivity is impossible due to pro-competition right of access statutes (Massachusetts, New York, Maine, Pennsylvania, Virginia, New Jersey, Delaware, Rhode Island, and the District of Columbia).[16] These transactions demonstrate that non-cable MVPDs do in fact not require exclusivity for economic survival.

For all of the reasons set forth above, and for all of the reasons set forth in Time Warner's previous submissions in this proceeding, the Commission should not create any rules that interfere with cable operators' existing contracts or create disparity among various MVPDs with regard to the ability to enter into future exclusive contracts.

Respectfully submitted,

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[16]See Communications Daily (March 3, 1998).